NO. 92-1853

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LITHO RANGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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No. 91-3619

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	**O R D E R**
	)	
LITHO R. RANGE, JR.,	)	
	)	
Defendant-Appellant.	)	

BEFORE: JONES and NORRIS, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing

APPENDIX "A"

and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 91-3319 & 91-3620

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LITHO RANGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF OHIO

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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APPENDIX "B"

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision, rendered herein is so significantly flawed, with reference to several very distinct holdings that, both, for fear that such holdings might go forth as the position of this Court and because in counsel's judgment, they truly offend the due process concept of fundamental judgment and even handed justice, they should be considered by the full Court.

Specifically, as argued below the following contentions are being made:

(a) Given the unassailable finding that Ellington (the co-defendant) should have been granted a Mis-trial early on in this trial, the conclusion that due process would have required such a finding for this appellant as well at that time is simply to compelling to be overlooked, as it was without comment by any reviewing Court. When we take into further consideration that the Court also credited the same witness whose statements victimized Ellington, also revealed to the jury that this appellant had been recently released from jail, which was held not a very sufficient faus pas, when considered together we certainly have a far different mix than that which confronted counsel at any point

earlier than when the ruling was made that Ellington should have been granted a Mis-trial. Obviously then whether the resulting issue here can be raised for the first time in an Application for Rehearing is something the entire Court should address.

(b) The panel's decision that all evidence considered in determining the admissibility of statements offered under favor of Rule 801(d)(2)(E), are automatically deemed admissible if the statements for which admission was being sought are deemed admissible. This holding seems clearly to clash with the holding in **United States v. Bourjaily, 483 U.S. 177, 107 S. Ct., 2775 (1987)**, which not only determined that "co-conspirator statements ... have been considered to be somewhat unreliable" (id., at 2790), but also made a further point of critical significance here.

Specifically, and clearly the panel did not reckon with the determination made in *Bourjaily* that "the evidentiary standard [for Rule 801(d)(2)(E) evidence] is *unrelated* to the burden of proof on the substantive issues" (id., 2778). *(Emphasis supplied.)*

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 91-3319 & 91-3620

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LITHO RANGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Litho Range, the appellant herein, moves the Court under favor of Rule 40, Federal Rules of Appellate Procedure, for a Rehearing of his appeal. Further, the appellant makes the clear

and unequivocal Suggestion (as is permitted by Rule 35) that this cause should be considered en banc by the entire Court.

In support of this Petition for Rehearing En Banc, the following specific contentions are made:

I

Clearly the fact that the panel (in the Opinion[1] released herein) fully credited the trial Judge's insufficient response to the objection made by this appellant (to an inappropriately volunteered statement by the Government's most critical witness -- *i.e.*, Jay Jackson) as being dispositive of the co-defendant's appeal is a matter deserving intense scrutiny by the entire Court. Here we start with the cogent and compelling finding, by the panel, that the error involved was so prejudicial as to actually be impervious to any curative or corrective instructions that could even be imagined.

---

[1] For the convenience of the Court in an effort to facilitate easy reference, the Opinion is attached to this Application as an Appendix.

This finding alone makes it manifest that the effect of this critical flaw should be analyzed in a light far different than counsel for this appellant could have ever anticipated.

Postured then by the finding here being referred to -- *i.e.*, that a mistrial should have been directed in Ellington's favor at the point of the infraction *(Appendix to Published Opinion, at p. 4)*, the need for Range's appeal to be looked at in a different light is so compelling as to literally be inescapable. Now we certainly concede that "absent extraordinary circumstances" an appellate issue cannot be raised for the first time in an Application for Rehearing. See **Moore v. United States, 598 F.2d 439 (5th Cir. 1979)**. *Cf.*, **United States v. LePatourel, 571 F.2d 405, 410-411 (8th Cir. 1978)**, where "the interest of the administration of justice" was deemed a sufficient basis to warrant the Court giving meaningful and dispositive attention to an issue raised for the first time in a Rehearing context.

Indeed, it is really beyond dispute that the Court's *oversight*

concerns necessarily include the right to resolve an issue not specifically passed on by a full panel. This is particularly so where, as here, the resolution of such issue in favor of the accused is beyond any doubt or, also the case here, an injustice would surely result if the Court failed to do so. See **Singleton v. Wulft, 428 U.S. 106, 121 (1976)**. Also see, in this regard, **Schanen v. United States Department of Justice, 798 F.2d 348, 349 (9th Cir. 1985)**, where the Court *allowed* the Government for the first time to advance in an Application for Rehearing an issue that had not even been raised at the trial level. As to this, surely what is good for the goose is also good for the gander.

The significance of the *Schanen* opinion should not be limited to the compelling fact that the Rehearing Application involved therein was submitted by the Government rather than some mere person -- against whom the Opinion had been rendered. Simply put, one should look to the fact that justice is always the objective of our judicial system, even when the asserted victim of

an injustice is not represented by an agent of the Government.

All this brings us to emphasize that when the contention here and now being made is considered in the light of the erroneous failure of the Court to have granted Ellington a Mistrial (which failure occurred before the bulk of the evidence in this case was proffered), a further weighty point is made here in favor of review. Now we fully recognize that the propriety of the trial judge's denial of the Motion for a Mistrial was not specifically raised as an appellate issue. But again, that truly is the fault of trial counsel who arguably could be condemned for, both, not fully assaying the possible impact of the flaw itself standing alone, or for not considering it in conjunction with *the flaw* that was yet to occur, which resulted in the event that led to the dramatic reversal of Ellington's conviction. So postured, the cogency of the point made becomes even more compelling.

As to this really dispositive contention, the following segment of the Record provides critical support for our thesis.

Here the Record shows the following occurred during Jay Jackson's cross-examination by counsel for Ellington -- appellant's co-defendant at the trial:

> Q. You told us this morning about your employment. Back in '83 and '84, you told the police, by way of written statement on November the 1st, that you worked at Litho Range's nightclub or bar. Are you remembering that?
>
> A. Yes.
>
> Q. Yes. How old were you in 1983 and 1984?
>
> A. Oh, I was about, let me see -- about 15 or 16.
>
> * * *
>
> Q. I see. Would you reconsider your testimony if I suggest to you that the paperwork for the purchase of the bar was done during the latter part of 1985 and that the bar was not opened until 1986?
>
> A. No.
>
> Q. That's your contention, between '83

and '84, you were the cleanup boy in Litho Range's nightclub?

A. That was about the years that I assumed. That wasn't no definite years, those the years that I assumed, Mr. Shaughnessy.

I can indicate for you, also, that *Litho [Range] was just returning home from jail then.*

MR. PETERSON: Your Honor, objection.

THE COURT: Sustained. There's no question to you.

* * *

(The following proceedings were had in chambers out of the hearing of the jury:)

MR. WILLIS: If it please the Court, during the cross-examination of Mr. Jackson at the hands of Mr. Shaughnessy, this witness, without the benefit of a question before him, *proceeded to volunteer and indicate to the jury, obviously with the intent to injure the defendant, Litho Range, that Mr. Litho Range had recently come home from the penitentiary which he associated with the opening of the bar, I suspect.* I think that that testimony was devastating to the defendant. Mr. Range had no intention of putting -- of testifying, and thus putting the issue, any issues about his prior incarceration, his prior convictions before the jury.

> And because I think it was willful, I feel that the Court ought to grant Mr. Range a mistrial. I don't think that any instruction, curative instruction, could ameliorate this situation or neutralize it.
>
> THE COURT: The Court's recollection is that the witness began to make a statement which was made immediately after an answer was offered to a question which was put to him. The first part of what he had begun to say related to the answer that he gave pursuant to the question, and an objection, as he began to expound further, was immediately made, sustained by the Court. And *it's not the Court's judgment that the jury became aware of anything that is detrimental to Mr. Litho Range sufficient for the Court to declare this trial a mistrial. Overruled.*

Jackson, Vol. 2, pp. 168-171. (Emphasis supplied.)

II

Also of critical significance, with reference to the Petition before the Court, is the insuperable fact that Range was truly and undeniably victimized by the trial Court's admission of what the panel termed proper 801(d)(2)(E) evidence. The fact that this conclusion was premised upon a rather summary rejection of our specific argument that a considerable quantity of this evidence was,

at most, only "'idle chatter'" and consisted of statements that could not possibly be regarded as having been "made in furtherance of the charged conspiracy" *(Appendix to Published Opinion, pp. 3-4)*, further accentuates the serious flaws here being centralized.

In our judgment, it seems rather obvious that even if we fully credit the finding that all of the statements actually made by Ellington were properly admitted because "statements are made in furtherance of a conspiracy when they identify its participants, reveal the source or purchaser of controlled substances, or inform participants of the status of the conspiracy" *(ibid)*, the panel's resolution seems rather arbitrary. Simply stated, the real problem with this resolution is that it simply does not address the problem involving wilfully calculated statements made by the Government informant in this case. The fact that this witness admitted he was directed to insert the name of Litho Range, the appellant herein, into conversations that were artificially precipitated and *manipulated*, by him at the Government's direction, *for the sole*

purpose of having Ellington make comments that could be used against Range is hardly something that should not have even been discussed -- to say nothing of being reckoned with.

This being so, the panel's conclusion that in its "estimation, *Ellington's* statements fall well within these parameters, particularly when taken together with the totality of the testimony introduced during trial, which included Jackson's account that Range had made four deliveries of pure heroin to Ellington's home and frequently visited to collect his share of the proceeds" *Id. p. 4*, is truly exposed as being besides the point. While that is really bad enough, the further fact exposed in the panels' hollow thesis shows that the Court apparently paid no heed, none whatsoever, to the *indisputable* fact that the most egregious references to Litho Range in these conversations *were not contained in statements made by Ellington*, as the panel inferentially determined, but in statements *made by the informant* to Ellington and others. This follows because *of all the statements made by Ellington*. Even *if*

we assume all of his statements were admissible, they pale into insignificance in the wake of the intentional and well-crafted, devastating characterizations of Litho Range intentionally made by the Government's paid informant at the insistence of his orchestrator. Our reference here is to the following segment of the Record of the informant's testimony:

> **Q.** In your business, you testified here you traded on other people's names. You mentioned Virgil, something about "KB," or Kenneth Bradley, or to suggest you knew him. You were kind of trading on his name to add prestige to your reputation; is that right?
>
> **A.** Right.
>
> **Q.** How do you know when Genie Ellington was using the name Litho Range he wasn't trying to add prestige to his conversations and whatever it was he was doing? You don't know that, do you, of your own knowledge?
>
> **A.** I can't prove it.

* * *

Q. Now, did the government tell you to insert into your conversations with Ellington when you were riding around looking for Mr. Jackson that Litho Range wanted him killed and that Litho Range was a killer, or something to that effect? You recall constantly throwing his name in connection with violence in that conversation? You remember that, don't you?

A. I remember doing that, saying that, yeah. But it wasn't the government that had asked me to do that; it was from the previous conversation the day before.

Q. That was unrecorded?

A. That was unrecorded, right. I was trying to get it on the record, tape recorder.

Q. Now, ... it's true that ... invariably when Range's name would come into a conversation, you were milking it out of Genie?

A. Not all the time.

Q. Most of the time?

A. Well, after Eugene volunteered --

Q. No. Most of the time or not?

* * *

A. When Eugene Ellington gave me the name of Litho Range as his source of supply, then I asked him about it.

Q. In other words, you call[] that "picking," don't you? You were trying to pick him?

A. No, he volunteered that in the beginning.

Q. Okay. But once the name Litho Range hits into the mix, then you were constantly trying to pick him?

A. Yes, that's true.

Walter Grosser, at Tr., 548-550. *(Emphasis supplied.)*

In addition to the unequivocal thrust of the above testimony, which verifies our contention that far more damage was done by the statements made by the informant than by Ellington (the alleged conspirator, whose statements were deemed to be admissible under 801[d][2][E]) there were other statements *made by the informant*

the admission of which cannot be justified on any known theory.

Here our reference is to certain points made in our Opening Brief. Hopefully, the compelling impact thereof will not continue to be buried unnoticed and uncommented on by this Court under the cliched holding that these statements were made in furtherance of the charged conspiracy. Specifically, our reference is to the following contentions:

(9)

> In Exhibit No. 140, the taped conversation of October 11, 1990, Grosser (after being told by Ellington that "Litho" was "leery of Buddy" and believed that "Buddy was up with" the drug theft by Jackson) volunteered the egregious statement that if that were true "he wouldn't be here." This gross observation he punctuated by saying "if Litho kills you man [i.e., Ellington]" he would "talk to Jay" himself. *Id., 462-463.*

(10)

> Next, on this same tape, Grosser embellished his naked idea that Range was a killer by generating an

> egregious response from Ellington. This he did by asking: "what Litho thought, that Buddy would be in on it too:" And, by asking Ellington if he thought Ellington had actually "killed [Jay] Jackson who was at the time missing." *Ibid.*

Appellant's Opening Brief, p. 12.

Postured then by the panel's blanket endorsement of the trial Court's ruling that *statements* of the ilk referred to above as having been made by the Government's own informant, can be regarded as having been made in furtherance of a charged conspiracy, are automatically admissible even if they occurred while the informant was manipulating anyone and everyone he talked to into putting a person targeted by him in the worse possible light -- the informant's admitted purpose here.

Postured then by the panel's blanket endorsement of the trial Court's ruling that even those statements and insinuations wilfully made by an informant (no matter how devastating) are automatically admissible, the unanswered question that perforce

arises as to what are the limits beyond which an informant cannot go in wilfully manipulating an artificial conversation in the hopes that an asserted informant, either, affirmatively makes damaging statements against others not privy to the conversation, or, indirectly, by having them respond to questions that insinuate the existence of equally damaging facts.

III

In rejecting the argument that "the trial Court erred in refusing to instruct the jury that co-conspirator statements should not be considered as substantive evidence" *(Appendix to Published Opinion, p. 4)*, the ruling made by the panel seems clearly to have been somewhat arbitrary. If not that it is at least clearly misdirected. Indeed, in taking the position, indefensible in our judgment, that **United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir. 1989)**, validates the rejection of the proffered instruction: the Court proceeded to punctuate its thesis by categorically stating that the "defendant advances no compelling reason to justify a

departure from this practice in his own case," *(Appendix to Published Opinion, pp. 4-5)*.

At the risk of being unduly censorious, here it seems clearly to be the case that the failure to credit the appellant's arguments, made in his Opening Brief, at pp. 28 et. al., cannot be defended. This follows because once it is recognized, as was specifically stated in **United States v. Bourjaily,** that "the evidentiary standard [for the admission of 801(d)(2)(E) evidence] is unrelated to the burden of proof on the substantive issue," **(Bourjaily, at 107 S.Ct., 2728)**, we have our compelling reason for departing that was said to be lacking.

In further amplification of the criticism here being voiced,of the panel's refusal to reckon with holdings made in *Bourjaily*, the panel's holding that all evidence properly *considered under Evidence Rule 104*, in determining the admissibility of evidence proffered under Evidence Rule 801(d)(2)(E), is likewise rendered admissible if the *proffered evidence* is ruled admissible is likewise

flawed and indefensible.

Actually it should suffice to note that no Court, prior to the inferential ruling made in this case, has ever taken the outright position that all such evidence is admissible as substantive proof. With this being a fact surely more consideration should be given this issue before it goes forth as the law of this circuit. This is particularly so since clearly the expressed thesis can no more survive meaningful scrutiny than it can bootstrap itself into a viable precedent.

Nos. 91-3619/3620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff-Appellee,	:	ON APPEAL from the United States
	:	
v.	:	District Court for the Northern District
	:	
LITHO R. RANGE (91-3619), EUGENE ELLINGTON (91-3620)	:	of Ohio
	:	
	:	
Defendants-Appellants.	:	

Decided and Filed December 23, 1992

Before: JONES and **NORRIS,** Circuit Judges; **WELLFORD,** Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Litho Range and Eugene Ellington appeal their drug-trafficking convictions, which resulted in the imposition of thirty-year terms of imprisonment.

APPENDIX "C"

Although they raise numerous issues on appeal, we limit our discussion below to the enhancement for obstruction of justice that each received under the Sentencing Guidelines. All other allegations of error are addressed in a separate, unpublished appendix to this opinion. Because that Appendix explains our reasons for reversing Ellington's conviction, the opinion's effect is necessarily limited to the sentence imposed upon defendant Range.

The Sentencing Guidelines include the following provision: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." United States Sentencing Commission, *Guidelines Manual*, §3C1.1 (Nov. 1990). According to the Application Notes that accompany this section, intimidating witnesses and giving materially false information to a probation officer both represent the type of conduct to which this enhancement applies. U.S.S.G. §3C1.1, comment. (n.3 (a) & (h)).

During trial, the district court received three separate reports from the United States Marshals regarding inappropriate and disruptive behavior by the defendants. After the second incident, the trial judge addressed the following remarks to counsel in chambers:

> It's come to my attention that the two defendants are mouthing off. I want you to tell them once more that it's come to the Judge's attention and he is going to, for the second time, allow the lawyers to talk to them to tell them not to talk to witnesses, not to bad-mouth witnesses, not to look threateningly at witnesses, and I appreciate it.

The third report resulted in an on-the-record colloquy with Marshal Joe Thomas:

> MARSHAL THOMAS: ... Mr. Ellington has made two comments. Earlier today before lunch break he said that he was getting sick of being brought back and forth to court and he wasn't going to go back to the court. And after the last recess on the way down, he said that he, that tomorrow he was not going to come to court. And, furthermore, he wasn't even going to leave the Lake County jail tomorrow. And that's the sum and substance of it all.

> THE COURT: All right. I believe that he has made this statement perhaps as one which is puffing rather than one which is putting us on notice what he intends to do. There is no defendant who puts this Court on notice as to what he intends to do....
>
> . . . .
>
> If he offers the marshals any resistance, he is going to be chained, he is going to be gagged, and I'm going to put him in a straitjacket and bring him into court in that condition in the presence of the jury. I have a perfect right to do that if he offers resistance.

The record does not reveal any further instances of inappropriate conduct, although the government alleges that both defendants supplied the parole officer who prepared their presentence reports with false information.

At the sentencing hearing, the trial court assessed a two-step enhancement to the offense levels of each defendant for obstruction of justice. The court explained the reason for its decision in the following terms: "Adjustment for obstruction of justice, three times the marshals came to me and made complaints in connection with the conduct of Mr. Range and Mr. Ellington. And I will accept

and increase of two points for that conduct that I reported to the lawyers of such Defendants."

This court reviews the factual findings of the district court that relate to sentencing considerations for clear error. *United States v. Head*, 927 F.2d 1361, 1372 (6th Cir.), *cert. denied*, 112 S. Ct. 144 (1991). Moreover, the government need only prove the facts used in sentencing determinations by a preponderance of the evidence. *United States v. Chambers*, 944 F.2d 1253, 1271 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1217 (1992). For this court to perform its function properly, however, the record developed below must indicate with specificity what facts the district court considered in reaching its offense level calculation. The record now before us is simply too cryptic to enable us to say with the requisite degree of certainty that the decision to enhance the sentences of the defendants for obstruction of justice is free of error.

Several considerations lead us to this conclusion. First, we

note that both defendants received enhancements for obstruction of justice. However, the district court failed to differentiate between the two during the sentencing hearing. We know from the record, for instance, that only Ellington was reprimanded a third time. Yet the trial judge's remark, that "three times the marshals came to me and made complaints in connection with the conduct of Mr. Range and Mr. Ellington" leaves open the possibility that defendant Range was penalized for the behavior of his co-defendant. When more than one defendant is being sentenced at the same hearing, it is of critical importance that the district court state with clarity the facts on which it relies in sentencing each defendant.

A second area of concern involves the reports received by the trial judge that the defendants were "looking threateningly" at the witnesses. Although the judge did not indicate whether this behavior factored into his decision to enhance the sentences for obstruction of justice, we assume from the in-chambers remarks already cited that it may have. That being the case, we find the

record inadequate to support the use of this conduct to enhance defendants' sentences. By anyone's measure, the interpretation of a "look" is sufficient subjective to merit further factual development. At the very least, the appellate record must contain enough detail to satisfy us that the conduct in question was intended to intimidate witnesses. The trial court's comment that it had received a report that defendants were "mouthing off," followed by its admonition not to "look threateningly at witnesses," does not provide us with the underlying detail necessary to an independent review on appeal.

In remanding, we do not mean to suggest that the district court must conduct an extensive adversarial hearing. Instead, we seek to provide the court with an opportunity to develop, on the record, the precise reasons for its decision to apply the obstruction of justice enhancement, so that we will be in a position to review verifiable facts rather than subjective impressions. These findings should be sufficiently individualized so that we can review Range's

sentence separately. Finally, should the district court rely on the report that defendants were "looking threateningly" at witnesses during trial, it should describe on the record the indicia that led to this conclusion. Such indicia might include words or gestures that accompanied the conduct, the identity of the persons at whom the looks were directed, or the timing of the objectionable behavior.

For the foregoing reasons, the sentence of defendant Range is **vacated** and this cause is **remanded** for further proceedings consistent with this opinion.

Nos. 91-3619 & 91-3620

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	
Plaintiff-Appellee,	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
v.	
LITHO R. RANGE (91-3619), EUGENE ELLINGTON (91-3620)	**APPENDIX TO PUBLISHED OPINION**
Defendants-Appellants.	

BEFORE: JONES and **NORRIS,** Circuit Judges; **WELLFORD,** Senior Circuit Judge.

PER CURIAM. This appendix addresses the remaining issues raised by defendants Litho Range and Eugene Ellington.

I.

Defendants were charged along with three other individuals in a thirteen-count superseding indictment that alleged violations of 21 U.S.C. §841(a)(1) (distribution of a controlled substance), 18

U.S.C. §2 (aiding and abetting), and 18 U.S.C. §1956(a)(1)(B)(i) (money laundering). These charges stemmed from a government investigation into heroin trafficking in Cleveland, Ohio.

On March 21, 1992, a jury found both Range and Ellington guilty of conspiracy to distribute heroin. It also found Ellington guilty of six substantive counts of distribution. The district court subsequently sentenced both men to 360 months' imprisonment, five years' supervised release, and a $50 special assessment on each count of conviction.

II.

We turn now to the specific allegations of error urged by defendants.

A. Introduction of Tax Return Information

During the course of the trial, the district court permitted Internal Revenue Service agent Arthur Ventura, Jr., to testify that Ellington had not filed federal income tax returns. Ellington argues that the admission of Ventura's testimony was both

irrelevant and prejudicial.

We begin by noting that challenges to the relevance of evidence admitted by the trial court are reviewed for abuse of discretion. *United States v. Walton*, 909 F.2d 915, 925 (6th Cir. 1990). Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

In this case, the government sought to show that defendant neglected to file an income tax return despite the acquisition of significant financial assets. A jury could reasonably infer from such behavior that Ellington tried to hide his income because it resulted from illicit activity. The use of tax returns to point out discrepancies between reported and actual income meets the test of relevance, *United States v. Newton, 891 F.2d 944, 948 (1st Cir. 1989)*, in light of the fact that the concealment of proceeds from drug trafficking is an undeniable facet of a conspiracy to distribute

narcotics. *United States v. Towers*, 775 F.2d 184, 187 (7th Cir. 1985) (citing *United States v. Metz*, 608 F.2d 1417, 153 [5th Cir. 1979).[1]

Accordingly, we conclude that the district court properly exercised its discretion in permitting the admission of Ventura's testimony about the tax returns.

B. Sufficiency of the Evidence

Both Ellington and Range contend that the evidence presented during trial was insufficient to support their convictions for conspiracy beyond a reasonable doubt. Accordingly, they argue that the district court erred in denying their motions for acquittal.

To prevail on this issue, defendants bear a heavy burden. In reviewing such claims, this court assesses "whether, after

---

[1] In reaching this conclusion, we distinguish this court's recent decision, *United States v. Carter*, No. 91-1830, 1992 U.S. App. LEXIS 15513 (6th Cir. July 8, 1992). *Carter* acknowledged that the use of tax returns is permissible when, as in the instant case, the defendant "engaged in extravagant spending and /or possessed massive unreported wealth." *Id.*, slip. op. at 7.

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319 (1979)*(emphasis in original). The record before us contains sufficient evidence to sustain the conspiracy convictions of both men.

Both defendants focus their attack on the credibility of witness Jay Jackson, observing that his testimony contained internal inconsistencies and was inspired by the favorable plea bargain that he negotiated with the government. Furthermore, they contend that Jackson's past criminal behavior and substance abuse calls his veracity into question. This argument overlooks one essential point: defense counsel made the jury fully aware of these alleged testimonial infirmities. Nevertheless, its members chose to find his testimony, at least when coupled with that of other witnesses, sufficiently credible to support a conviction. We are not prepared to say that, given the facts before it, the jury's verdict was

irrational.

C. Co-conspirator Testimony

Defendant Range challenges the admission of co-conspirator testimony attributed to Eugene Ellington by witness Walter Grosser, who aided the government during its investigation of suspected drug trafficking.

Fed. R. Evid. 801(d)(2)(E) provides that "[a] statement is not hearsay if ... [it] is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Before the statement of a co-conspirator can be introduced, however, the trial court must decide if there is sufficient evidence to establish that a conspiracy existed between the declarant and the defendant. The standard of proof required to resolve this preliminary factual question is a preponderance of the evidence. *Bourjaily v. United States, 483 U.S. 171, 175 (1987).* When the admissibility of a co-conspirator's statement represents a close call, this court will not

generally disturb the ruling of the trial court. *United States v. Hitow, 889 F.2d 1573, 1581 (6th Cir. 1989)* (citing *United States v. Hamilton, 689 F.2d 1262, 1270-71 (6th Cir. 1982), cert. denied, 459 U.S. 1117 [1983]).*

With that analytical context in mind, we now turn to Range's specific allegations of error. He cites ten different passages from Grosser's testimony that referred to statements made by Ellington regarding him. He argues that Ellington's statements, even if credited, constituted "idle chatter" and were not made "in furtherance of" the conspiracy.

A review of these statements, however, leads to a contrary conclusion. On balance, the remarks attributed to Ellington concern Range's participation in cash transactions and his role in the enterprise. As this court has noted, statements are made in furtherance of a conspiracy when they identify its participants, reveal the source of purchaser of controlled substances, or inform participants of the status of the conspiracy. *Hitow*, 889 F.2d at

1581 (citing cases). In our estimation, Ellington's statements fall well within these parameters, particularly when taken together with the totality of the testimony introduced during trial, which included Jackson's account that Range had made four deliveries of pure heroin to Ellington's home, and frequently visited to collect his share of the proceeds.

We also reject Range's contention that the trial court erred in refusing to instruct the jury that co-conspirator statements should not be considered as substantive evidence. This court has upheld the denial of similar limiting instructions in the past, *see United States v. Swidan, 888 F.ed 1076, 1081 (6th Cir. 1989)*, and defendant advances no compelling reason to justify a departure from this practice in his own case.

D. Confrontation Clause Challenge

Range next insists that his Sixth Amendment right to confrontation was compromised because the trial court placed some limitations on the examination of witness Joseph Cottichia, who

had served as Jackson's attorney. The ostensible purpose of calling Cottichia was to show that a confession Jackson made after his arrest had been coerced, which in turn would cast doubt on the testimony of Jackson as well as government law enforcement agents Ventura and Daniel Moritz.

We should note that the trial court permitted a motion to suppress filed by Cottichia to be introduced into evidence. This motion contained assertions that Jackson's confession had been involuntary, alleging that the agents "warned that, if he didn't cooperate and ended up in the penitentiary, at his young age he would end up being some prisoner's 'bitch.'" The admission of this motion into evidence certainly furthered the objective of Range's attorney to impeach the testimony of both Jackson and the agents.

The trial court was under no obligation to afford counsel for Range unbridled leeway in examining Cottichia. On numerous occasions, this court his observed that a trial judge has discretion

in limiting cross-examination. *See, e.g., Dorsey v. Parke, 872 F.2d 163, 166 (6th Cir.), cert. denied 493 U.S. 831 (1989).* In view of all the circumstances, we are unable to say that the trial court overstepped this discretion.

E. Sentencing Issues

As a final matter, we turn to challenges, not already addressed in the published portion of this opinion, regarding the calculation of both defendants' offense levels under the Sentencing Guidelines.

1. Role in the Offense

The district court enhanced Range's offense level by four points because it concluded that he was a "manager" in the offense. Section 3B1.1(a) of the Sentencing Guidelines permits such an enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." United States Sentencing Commission, *Guidelines Manual, § 3B1.1(a) (Nov. 1990).* It appears that the

district court misread the guidelines. Under § 3B1.1(b), a manager of a criminal activity receives a three-level increase, not the four levels imposed. U.S.S.G. §3B1.1(b). In addition, the court failed to identify the individuals that it included to reach the "five or more participants" requirement.[2]

2. Drug Quantity

Ellington contends that the trial court erred in the amount of heroin it used to calculate his offense level. Essentially, defendant asks us to rule that the amount of heroin attributed to the conspiracy should be excluded from the calculation. Instead, he wishes us to rely only on the amount of heroin actually seized. This we decline to do. The jury convicted defendant of conspiracy, and the law is clear that, under such circumstances, it is appropriate to use the amount of controlled substances attributable to the conspiracy in caclulating the offense level. See

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[2] While the trial court concluded that the criminal conduct was "otherwise extensive," there is nothing in the record to support this conclusion.

U.S.S.G. 1B1.3, comment. (n. 1, (1)(a) & (e)); *United States v. Paulino, 935 F.2d 739, 756-57 (6th Cir.), cert. denied*, 112 S. Ct. 315 (1991). Moreover, a district court's finding as to the amount of drugs a defendant will be held accountable for is a factual finding that this court must accept unless clearly erroneous. *Walton, 908 F.2d at 1300-01.*

We find no error in the trial court's calculation of the drug quantity.

3. Acceptance of Responsibility

Finally, Ellington contends that he should have been granted a two-step reduction in his offense level because he accepted responsibility for his criminal behavior. U.S.S.G. § 3E1.1. In support of his claim, defendant points out that he attempted to negotiate a guilty plea and never denied that he had some involvement in drug trafficking. We review the district court's denial of this offense-level reduction for clear error. *United States v. Fleener, 900 F.2d 914, 917 (6th Cir. 1990).*

While Ellington is correct in observing that exercising his right to a trial does not automatically preclude a downward adjustment for acceptance of responsibility, it undeniably makes his case more difficult, particularly because the defendant bears the burden of showing by a preponderance of the evidence that this reduction is merited. *United States v. Urrego-Linares, 879 F.2d 1234, 1239 (4th Cir.), cert. denied, 493 U.S. 943 (1989).* In our view, defendant has not met this burden.

F. Motion for Mistrial

The final assignment of error raised by Ellington concerns the testimony of his nephew, Jay Jackson. Although an original co-defendant, Jackson entered into a plea agreement with the government and later testified as a cooperating witness. During cross-examination, counsel for Range probed Jackson's past relationship with his uncle, which led to the following exchange:

> Q. He [Ellington] never tried to teach you to box?
>
> A. No.

....

No. He used to just come out there [to the juvenile youth home] and tell testimonies to the little kids. He used to just like being seen out there where I was, showing off. That's all he used to come out there for.

Q. Showing off his boxing pictures?

A. They barred -- can I -- they barred him off the premises. Why? Because he raped a little guy, a little guy --

MR. WILLIS: Your Honor --

THE COURT: Sustain.

Do not offer information not asked for by the question, Mr. Jackson. Listen carefully to the question; make your answer responsive.

Although counsel for Range objected to Jackson's answer, counsel for Ellington failed either to request a curative instruction or make a contemporaneous motion for a mistrial. Counsel did, however, move for a mistrial in a later conference held in chambers. This motion was denied.

Because counsel for Ellington failed to object to Jackson's

testimony in a timely fashion, we review for plain error. Fed. R. Crim. P. 52(b); *United States v. Cunningham, 804 F.2d 58, 63 (6th Cir., 1986), cert. denied, 481 U.S. 1037 (1987).* The reason for this requirement is obvious: the lack of a timely objection deprives the trial court of an opportunity to select the form of remedial action that will be least disruptive to the proceedings. See Fed. R. Evid. 103 advisory committee's note.

Some testimony, once put before the jury, simply mandates a mistrial. An example of such testimony arose in the case of *United States v. Gibson, 786 F.2d 1167 (6th Cir. Feb. 19, 1986)(table case, text in Westlaw, No. 85-5356)*, where a prosecution witness gave unsolicited testimony that the defendant was an escaped prisoner at the time of arrest. Defendant's motion for a mistrial was denied, and he was subsequently convicted. On direct appeal, this court considered whether the tainted testimony so adversely affected the defendant's substantial rights as to compel reversal. See *United States v. Terry, 729 F.2d 1063, 1070 (6th*

Cir. 1984). The standard of review utilized in *Gibson* was articulated well in *Kotteakos v. United States, 328 U.S. 750, 764-64 (1946):*

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the judgment should stand .... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The *Gibson* court found that the one remark was enough to stain the entire trial. *See also United States v. Poston, 430 F.2d 706, 708-09 (6th Cir. 1970)* (reversal required where witness testified that the defendant was on probation).

Similarly, in this case, Jackson's unsubstantiated, uncalled-for, irrelevant, inflammatory, plainly prejudicial pronouncement simply could not be erased from the minds of the jurors. In the

context of the entire trial, one cannot say, with fair assurance, that the jury's judgment was not substantially swayed by the sepsis. *See United States v. Smith, 403 F.2d 74, 76 (6th Cir. 1968)* (mistrial mandated where witness testified that defendant had just been released from the penitentiary, even though jury acquitted defendant on one of the two counts in indictment).

The prejudice of tainted testimony is all the more plain when the defendant, as in this case, does not take the stand. "A criminal defendant who chooses not to testify at trial is entitled to a presumption of innocence. One sure way to destroy that presumption is for a seasoned officer to interject an 'inadvertent' remark about a defendant's criminal history." *Terry, 729 F.2d at 1070.* Terry makes it clear that the testimony need not be the calculated remark of a veteran officer; "'the touchstone of prejudice is not the motive of the one who introduces the testimony; rather it is the effect of such testimony upon the jury.'" *Id. (quoting United States v. Ailstock, 546 F.2d 1285, 1290 (6th*

Cir. 1976). Once hyper-prejudicial evidence about prior heinous acts "inadvertently reaches the attention of the jury, it is most difficuly, if not impossible, to assume contined integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." *Government of the Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976)*.

With such hyper-prejudicial testimony in this case, it is difficult to believe that a curative instruction to the jury might right the wrong. Some testimony is simply too hotly prejudicial to be cured by the judge's cool voice of reason. As the Supreme Court in *Bruton v. United States, 391 U.S. 123, 135 (1968)*, noted, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *See also Krulewitch v. United States, 336 U.S. 440, 453 (1949)* (Jackson, J., concurring) ("[T]he naive assumption that prejudicial effects can

be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.").

Thus have many courts reversed a conviction on the basis of certain prejudicial testimony in spite of a curative instruction. See, *e.g. Gibson, supra; Smith, 403 F.2d at 77; Toto, 529 F.2d at 284; United States v. Carney, 461 F.2d 465, 466-68 (3d Cir. 1972)* (reversal required, despite curative instruction, where government witness, in responding to question regarding why he disliked defendant, replied that defendant had "tried to kill [him] and [his] two children"); *cf., United States v. Wells, 431 F.2d 432, 433 (6th Cir.)* ("[I]f the evidence is of such an exceptionally prejudicial character that its withdrawal from the consideration of the jury cannot remove the harmful effect caused by its admission, a new trial will be granted."), cert. denied, 400 U.S. 967 (1970).

In this case, a prompt admonition to the jury would not have cured the diseased trial. In the words of the poet:

> The Moving Finger writes; and having writ,
> Moves on: nor all your Piety nor Wit,

Shall lure it back to cancel half a line,
Nor all your Tears wash out a Word of it.

Rubaiyat, Stanza 71. *See Odom v. United States, 377 F.2d 853, 860 (5th cir. 1967).*

Even if, in this case, a curative instruction might have helped, none was given. The fact that counsel for Ellington did not request such an instruction does not absolve the trial judge of the responsibility for giving one, *sua sponte*. In *United States v. Ortiz, 507 F.2d 1224 (6th Cir. 1974)*, this court reviewed a situation where a witness, in unsolicited fashion, testified to an arrest of the defendant that did not result in conviction. It was held that "[t]he fact that [defendant's] trial counsel did not object or move to strike does not serve to waive this sort of error, nor does it excuse the failure of the judge to intervene and strike the offending testimony and instruct the jury to disregard it." *Id. at 1226. See also Ailstock, 546 F.2d at 1291* ("[W]e do not find that the failure of [defendants'] counsel to request a cautionary instruction [with regard to testimony that defendant had been in

prison twice before] excused the District Court from its duty to give such an instruction." -- the conviction was reversed.)

In summary, it was plain error for the district court to deny Ellington's motion for mistrial and he was entitled to a new trial.

II.

For the foregoing reasons, we **affirm** Range's conviction but **vacate** his sentence and **remand** that cause to the district court for further proceedings consistent with this opinion. Furthermore, Ellington's conviction is **reversed**, and the government's case against him is **remanded** to the district court for a new trial.